Volume 3, Issue 5
May 2007

ImmQuest

"Qui bene interrogat bene docet" "He who questions well teaches well"

Editors-in-chief: Cecil L. Rotenberg Q.C. and Mario D. Bellissimo

INSIDE

Focus – Security

CARSWELL

ODDS & ENDS cont'd

- Factors related to the best interests of the child, domestic violence or sexual offences.
- The applicant's ability to support themself.
- The passage of time since the infraction that resulted in a removal order.
- In the case of an applicant requesting a temporary stay, the anticipated length of stay.

Other considerations:

- CIC must consult the National Security Division of the Canada Border Services Agency (CBSA) when assessing an application where there are A34, A35 or A37 concerns.
- If the applicant is inadmissible on grounds other than those cited in the previous removal order (i.e., medical, criminality, security), they must apply for and obtain a temporary resident permit (TRP), a rehabilitation decision (or deemed to have been rehabilitated) or a Pardon (a foreign pardon or one issued by the National Parole Board). *A TRP does not overcome the need for an ARC*; the applicant requires both documents.
- An ARC can be granted for the return to Canada for permanent residence, for a one-time visit only, or from time to time, during a specified period and for a specific purpose (ex. medical treatments, work related activities).
- If an applicant requires an ARC but no fee has been submitted, a letter shall be sent to the client that indicates the requirement for an ARC. If no response is received within 90 days the application may be refused under A41 and A52 (1).
- If the Department defrayed the costs of multiple removals, the total cost of removal related expenses is to be recovered. The cost recovery fee, however, is for a single application.
- Where an exclusion/deportation order is made against a foreign national because they were an accompanying family member of an inadmissible person, there is no requirement to obtain an ARC.
- Any individual who has a right of appeal before the Immigration Appeal Division as per section 63 of the *Immigration and Refugee Protection Act*, can appeal a negative ARC decision to the IAD.
- A removal order must have been enforced (A52) before any consideration can be given to the issuance of an ARC. A visa shall not be issued to a foreign national who is subject of an unenforced removal order (R25). The requirements to enforce a removal order outside of Canada are outlined in R240.

Skilled Foreign Workers and Regulation 203(3)(d):

The Prevailing Wage Rate and Inferential Statistics

Cobus Kriek

The Law

When a Service Canada Foreign Officer provides a labour market opinion (LMO) on the appointment of a foreign worker on the economy, seven factors must be considered by the officer as required by *Immigration and Refugee Protection Regulations*, s. 203(3).[1] One of these factors is whether the wage offered to a foreign worker is consistent with *the prevailing wage rate* which is described in Regulation 203(3)(d).

Many practitioners have seen that Service Canada does not include profit-sharing or a commission on the wages that they demand to be paid to foreign workers.

The source of this interpretation is probably page 11 of the undated document called "Directives for Developing a Labour Market Opinion" for HRSDC, where Service Canada officers are instructed to use "accurate and objective labour market information to determine the prevailing wage rate" and that "commission

[1] SOR/2002-227

and tips" may not be used, but only a "guaranteed wage" may be accepted.

From the list of National Directives on Foreign Workers (also not available to the general public and employers), an appropriate directive could not be identified to provide a better understanding of what may be included in the "prevailing wage rate".

There is a British Columbia Foreign Worker Program Directive Number 8 called "Wages in Job Offer for Foreign Workers". As this particular directive is not publicly available without an Access to Information Request, it could not be used to solve the enigma of the logic and motivation used by Service Canada-HRSDC in the determination of their "prevailing wage rate".

Before examining the Service Canada/HRSDC interpretation of the term "prevailing wage rate", a practical example will be provided to provide a taste of reality.

Example of a Difference of Opinion

In a recent case there was a difference of opinion between an employer and a Service Canada Officer on the term "prevailing wage rate". The officer from Service Canada indicated that the prevailing wage rate for a fitter-fabricator (NOC 7263) should be CAD19.02 for *this occupation and a specific geographic area.* The employer indicated it should be CAD18.54, which is a difference of 48 cents per hour or CAD1,040 per year based on a total number of hours of 2,080 per year.

The officer from Service Canada mentioned that the wage of CAD19.02 is "on their list". The source of wage information provided by Service Canada could not be determined and three requests to identify the source and other vital statistics of the wage on "the list" were ignored or could not be answered.

The employer's position was that the Service Canada website (*www.labourmarketinformation.ca*) states that the wage for the occupation of a fitter-fabricator (NOC 7263) was CAD17.79 per hour for the average in 2004 (January-December 2004) for this specific area. If it is adjusted for 2005 by 2.2%, the wage should be CAD18.19 for the end of 2005. If it is again increased with 2% for 2006 (CPI average for January-December 2006), the wage should be CAD18.54 by January 2007. The Saskatchewan Department of Labour completed research on wages for this occupation in 2002. The low wage was CAD11.75 and the high wage CAD18.00. The mean was CAD 14.59. If this mean wage is adjusted by 2.3% for 2003, 2.2% for 2004, 2.2% for 2005 and 2% for 2006, the wage by January 2007 should be CAD15.90 which is significantly lower than the wage being offered at CAD18.54.

Statistics and Advice to the Immigration Practitioner

When analyzing information about a prevailing wage rate (the wage of the employer or the wage from Service Canada) in a specific geographic area, one must understand the basic concepts of inferential statistics underlying a particular "prevailing wage rate". Inferential statistics is the branch of statistics that deals with inferring characteristics of populations from characteristics of samples. In this case, a sample of a selection of wages of fitter-fabricators in these specific areas could have been used by Service Canada to infer the "prevailing wage rate" for this occupation and this area. When using a sample to make inferences about the general population it is assumed that the sample was a truly random sample. Sometimes researchers take more than one sample and determine variance between these samples to obtain more reliable statistics. What is also important is that researchers are using random samples that are representative of the population when making inferences of the population. This is the cornerstone of most statistical procedures. Immigration practitioners should request Service Canada to demonstrate that their "prevailing wage" rate is based on a random representative sample.

The "prevailing wage rate" could be determined by calculating the mode, mean or median from the sample or samples. The mode is the most common score or in this case the most common wage. The median (most people call it the average) is the wage that is the sum of the scores divided by the number of scores in the sample. The median is the score which corresponds to the point at or below 50% of where the scores fall when data are arranged in numerical order. When the distribution of the wages is symmetrical, the mean and the median will be equal.

Each one of these measurements of central tendency (mode, mean and median) has its own advantages and disadvantages. The mode and median are unaffected by extreme scores or outliers, as it is known in the world of statistics. The mean is affected by outliers or extreme scores and may not be representative of the full population. Another interesting statistical phenomenon is range (highest and lowest score) and is important

when interpreting a specific type of central tendency. The interquartile range is sometimes used to circumvent the problem of extreme scores on central tendency as the upper and lower 25% of scores are ignored. The most common statistical procedures make the assumption that the observations are normally distributed, i.e., the well known bell curve. However if it is positively or negatively skewed a specific method of central tendency will not be an effective inference about the population. It is politely suggested that Service Canada does not know whether the wage on their "list" is determined from a representative sample or samples, nor which choice of central tendency was used or whether their sample selection of wages are normally distributed. In submissions, Service Canada should be requested to provide this information if the officer does not agree with the wage offered by the employer to the foreign worker. This information is critical as to whether the wage on "the list" is an accurate reflection of "prevailing wage rate".

The website *www.labourmarketinformation.ca* identifies wages for certain geographic areas. However in reality these areas are further divided into smaller geographic areas which are defined by economic realities of that bigger geographic area, and as a result within certain bigger geographic areas there could be large differences in the actual "prevailing wage". In this case, the question could be asked whether the sample selected to obtain the "prevailing wage" as demanded by Service Canada came from the bigger area or a smaller region within the region mention on the website. For example, the area of Estevan on the website *www.labourmarketinformtion.ca* includes not only Estevan but also Oxbow. It is well known that wages in Oxbow are lower than Estevan due to very cheap real estate. Estevan has coal mines and employers in the oil fields which pay higher wages and the homes are significantly more expensive in that area. Similarly people in Saskatoon are getting paid more than Estevan. Immigration Practitioners should request Service Canada to specify from which geographic area the samples are selected to infer or deduct the "prevailing wage rate" as claimed by Service Canada.

Immigration Practitioners should also ask Service Canada whether their wage (from "the list") includes the following:

- people doing more than one job (weekend work); and/or
- overtime; and/or
- profit-sharing.

Or is the wage from "the list" actual hourly wages only?

For example, if a Canadian citizen, Canadian permanent resident or foreign worker welder in a certain area is doing a lot of overtime work, the annual wage will definitely be increased for that worker. Service Canada's calculation assumed that 2,080 hours are worked per year in order to calculate the hourly wage; CAD39,200 divided by 2,080 equals CAD19.02. However CAD39,200 divided by 2,500 hours equals to CAD15.68 per hour.

In terms of the law, a foreign worker may not have a second job and moonlighting is against the law as well. Service Canada will not accept profit-sharing when calculating the wage of a foreign worker, but overtime, moonlighting and profit-sharing of Canadians may be used to determine the "prevailing wage rate" as quoted by Service Canada. The logic of Service Canada in the interpretation of Regulation 203(3)(d) is seriously flawed and unreasonable.

One may ask, how can one say that the prevailing wage rate quoted by Service Canada include profit-sharing, commission, overtime and moonlighting? This is claimed by many employers. If the "prevailing wage rate" is obtained from the 2001 or 2006 Census, it definitely does include more than just the hourly wage. Although it does answer questions about how many hours were spent with part-time work, how much with full-time work, etc., it does not leave the government with an hourly wage or enough information to determine the hourly wage for a specific occupation (such as a fitter-fabricator or welder) for a specific area. Here are the questions from the 2001 and 2006 Census:

- Question 51 the 2001 Census: "Total wages and salaries, including commissions, bonuses, tips, etc., before any deductions";
- Question 52 of the 2006 Census: "Total wages and salaries, including commissions, bonuses, tips, taxable benefits, research grants, royalties, etc., before any deductions".

But the wage offered to the foreign worker may not include profit sharing, second jobs, overtime, tips, etc. This is a double standard.

Immigration Practitioners need to provide detailed wage research from many different sources, not just from the website *www.labourmarketinformation.ca*. They must contact industry organizations, provincial departments of labour and economic

affairs as well as other employers in the area that may have similar employees. They should give reasons why the lower or middle wage needs to be paid, as officers sometimes chose the higher wage by default. By providing the officer with detailed research on the prevailing wage rate, the officer may be in a position to make an informed and wise decision. However it is suggested that the officer disclose the vital statistics as discussed above if there is not agreement with the wage offered by the employer. This would ensure that the Immigration Practitioner would know the case against the client and the employer would be in a position to defend itself: *audi alteram partem*.

Procedural Fairness

The fact that a wage is on "the list" does not mean it complies with the requirements of natural justice and the inherent notion of procedural fairness. An employer cannot provide a suitable answer for a wage of which the origin and accuracy is questioned and as such cannot respond to the wage claim of Service Canada. In the case of *Rolfe v. Canada (Minister of Citizenship & Immigration)*,[2] Judge Gibson mentioned that "the obligation to provide adequate reasons is not satisfied by merely stating a conclusion".

In the case of *Canada (Ministre de la Citoyenneté & de l'Immigration) c. Savard*,[3] the officer's decision was overturned due to lack of reasons. By mentioning that a wage is on "the list" without providing its origin and vital statistical facts, as discussed above, does not constitute enough reason to respond to it effectively.

Suggestions to HRSDC/Service Canada

Lobby for more resources and a change of priorities: Canada is bringing 75,000 skilled workers (Federal Skilled Worker Class immigrants) into the country every year, only to hear that many immigrants cannot find jobs and their credentials are not being recognized. The 35,000 skilled workers coming here on work permits do not have most of these problems, and maybe a change in priorities is needed to address the needs of industry. It is suggested that lobbying efforts are made public: let industry know what is being done to obtain more resources. After all, HRSDC/Service Canada is serving industry and maybe the clients of Service Canada/HRSDC should be informed about these efforts. With more resources, officers could be trained in the intricacies and importance of inferential statistics.

Consider streamlining the policy development and control over the implementation of foreign worker policy in different provinces. Industry is increasingly seeing inconsistent decisions due to a lack of national policy and possible lack of training, which is obviously a result of a shortage of resources.

Publish National and Regional Policy Directives: this would cost nearly nothing. How can one expect industry to bring in foreign workers if the interpretation of Regulation 203(3) remains hidden to its clients?

Alternatives for Employers

Some employers will go to the Federal Court if they can afford to wait an additional six to eight months for a Federal Court decision before resubmitting to Service Canada and wait another eight weeks for a new LMO.

The time it would take to go to the Federal Court is a deterrent. More employers are using the PNP programs as the PNP officers tend to be more realistic and flexible on the issue of wage. The unfairness, double standards in wages, lack of transparency of HRSDC/Service Canada, strict adherence to wages on "the list" without any reasons given to employers are factors contributing towards the ineffectiveness of the Foreign Worker Program in some cases. Many of these problems are caused by a shortage of resources, and the hope is that the budget will allocate more resources to Service Canada/HRSDC.

Immigration lobbying organizations such as CBA and CAPIC and other industry organizations (in construction, petrochemical, agriculture, etc.) should lobby the Federal Government for change and moving more resources to the foreign worker section of our federal immigration infrastructure.

It is hoped that industry would not need to go to the Parliamentary Standing Committee on Immigration and the Auditor General before we see the progress that we urgently need.

Cobus (Jacobus) Kriek is a certified Canadian Immigration Consultant and an international recruiter. He is a member in good Standing of CSIC and a National Board member of CAPIC. He can be reached at 780-409-0931 or 905-608-2003. He can also be reached at cobus@matrixvisa.com.

2 2005 CarswellNat 3686, 2005 FC 1514, 53 Imm. L.R. (3d) 268.

3 2006 CarswellNat 4609, [2006] F.C.J. No. 126, 2006 FC 109, 2006 CF 109.